IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA531/2019
[2021] NZCA 142

BETWEEN	MALCOLM BRUCE MONCRIEF-SPITTLE First Appellant
	DAVID CUMIN Second Appellant
AND	REGIONAL FACILITIES AUCKLAND LIMITED First Respondent
	AUCKLAND COUNCIL Second Respondent

Hearing:	4 and 5 August 2020
Court:	Kós P, Cooper and Courtney JJ
Counsel:	J E Hodder QC and J K Grimmer for Appellants K Anderson, KEF Morrison and O J Towle for Respondents F M Joychild QC, J S Hancock and E C Vermunt for Human Rights Commission as Intervener
Judgment:	30 April 2021 at 10 am

JUDGMENT OF THE COURT

A The appeal against the High Court's substantive decision is dismissed.

B The appeal against the High Court's costs decision is allowed.

C Costs and disbursements payable in the High Court are reduced by 70 per cent.

D Counsel may file memoranda as to costs on the appeal within 10 working days from the date of this decision.

REASONS OF THE COURT

(Given by Courtney J)

Table of Contents

Introduction

[1] In New Zealand the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form, is protected by the New Zealand Bill of Rights Act 1990 (BORA). The question in this appeal is whether a council-controlled organisation (CCO) is under an obligation to facilitate the right to freedom of expression when it hires out a venue for a paid event.

[2] Regional Facilities Auckland Ltd (RFAL) is wholly owned by the Auckland Council. It is the trustee of Regional Facilities Auckland, a charitable trust and CCO established as part of the Auckland "super city" merger in 2010 to hold and manage assets previously held by territorial authorities in the Auckland region. One of these assets is the Bruce Mason Centre on Auckland's North Shore.

[3] An Australian promoter hired the Bruce Mason Centre to host speakers whose views (unbeknownst to RFAL) had attracted controversy overseas. Once the proposed event became public knowledge, a group opposed to the speakers' views signalled its intention to blockade the theatre to prevent the event proceeding. The venue hire agreement (VHA) was cancelled on the grounds of perceived health and safety risks arising from the anticipated action by the protesters.

[4] Mr Moncrief-Spittle had purchased a ticket for the event and was disappointed at its cancellation. Dr Cumin is an Auckland ratepayer and a member of the Auckland Jewish community. He was concerned that his community's future use of Council facilities could be affected by threats from those wanting to disrupt planned events. Mr Moncrief-Spittle and Dr Cumin sought judicial review of the decision to cancel the VHA. They argued that RFAL was under public law obligations to facilitate the right to freedom of expression and, in breach of those obligations, had cancelled the event without being satisfied that there were clear and sufficient public safety grounds for doing so.

[5] In the High Court, Jagose J held that RFAL's decision to cancel the VHA was not reviewable because RFAL was not exercising a public power.[1] As a result, nor did the Judge accept that RFAL's decision was made in the performance of any public function or power for the purposes of s 3(b) of BORA and, therefore, the BORA-protected right to freedom of expression was not engaged. The Judge also held that neither Mr Moncrief-Spittle nor Dr Cumin had standing to bring the proceedings.

[6] The appellants challenge each of these findings. They say the decision to cancel was (1) reviewable because it was in substance public and was made in the exercise of a public function or power for the purposes of BORA or, alternatively, that it had important public consequences, (2) unlawful because it was unreasonable on orthodox public law principles and (3) an unreasonable limitation on BORA-protected rights. They seek a declaration that RFAL acted unlawfully in cancelling the VHA, in order to secure confirmation that bodies responsible for managing public assets must recognise and facilitate the rights of free speech and association enjoyed by those organising unpopular or controversial events. They say that they have standing by virtue of their differing interests — Mr Moncrief-Spittle in relation to the particular event and Dr Cumin as an Auckland ratepayer, in relation to the future use by his community of public venues.

[7] The respondents seek to support the judgment on the grounds that the decision to cancel was (1) not reviewable because its context was essentially commercial rather than public, (2) not unlawful because it was not unreasonable and (3) if BORA was engaged, a reasonable limit on BORA-protected rights. As to standing, the respondents support the judgment only in relation to Dr Cumin; they now acknowledge that Mr Moncrief-Spittle had standing to bring the proceeding.

[8] In a separate decision, Jagose J ordered the appellants to pay costs on the basis that the proceedings did not concern matters of public interest.[2] The appellants appeal that decision as well, asserting that the proceeding did raise matters of genuine public interest and that either no costs should have been awarded against them, or the Court

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1 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399, [2019] 3 NZLR 433 [Substantive decision].

2 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2828 [Costs decision].

should have significantly reduced the costs payable by the appellants. The respondents support that judgment for the reasons set out in the judgment and on further grounds.

[9] The Human Rights Commission was granted leave to intervene, which it did on the question whether BORA was engaged.

[10] We deal with the issues as follows:

(a) Issue 1: is the decision to cancel reviewable?

(b) Issue 2: was the decision to cancel unlawful by reason of it being irrational, perverse or arbitrary?

(c) Issue 3: was the cancellation an unreasonable limit on the BORA rights engaged?

(d) Issue 4: did the appellants have standing to bring the proceedings?

(e) Issue 5: did the Judge err in making the costs order against the appellants?

Factual background

[11] RFAL operates through five divisions. One of these is Auckland Live, which is responsible for venues (mostly theatre-style) used for live performances. It books commercial and non-commercial events at its venues, which include the Bruce Mason Centre.

[12] In June 2018 Axiomatic Media Pty Ltd (Axiomatic) contacted Auckland Live to inquire about hiring a venue for two speakers in early August 2018. The ASB Waterfront Theatre and the Bruce Mason Centre were both available on the dates being sought and Axiomatic selected the Bruce Mason Theatre for a performance on 3 August 2018. When Auckland Live sought more information about the event, Axiomatic advised that the speakers were Stefan Molyneux and Lauren Southern and

described them respectively as "a renowned philosopher and author" and "a documentary filmmaker and best-selling author".

[13] A few days later Auckland Live sent Axiomatic a standard form VHA. The agreement required a hire fee of $5,000 or 12.5 per cent of net box office takings, whichever was greater. Axiomatic was to provide a written health and safety plan for the event and the venue addressing all hazards to RFAL's reasonable satisfaction at least 10 days in advance of the event. Axiomatic completed and returned the agreement. On 18 June 2018 RFAL countersigned the agreement.

[14] There were separate agreements between the promoter and the speakers under which the speakers would be paid AUD 10,000 each plus a share of profit from merchandise sales.

[15] Tickets went on sale on 29 June 2018. They were priced at between $79 and $749 each. Axiomatic publicised the date and venue of the event. Within a short time, there were complaints. RFAL learned that the speakers were self-described "alt-right" activists and that for the Australian leg of their tour venues had only been advised to ticketholders 24 hours beforehand. RFAL decided to approach the police for its view regarding any threat the event might pose.

[16] On 5 July 2018 a representative of Auckland Peace Action appealed to the Council directly, asking that the event be cancelled. On the morning of 6 July 2018, Auckland Peace Action issued a press release announcing its intention to blockade entry to the venue. Soon after that, RFAL management held a meeting to discuss the situation. There was particular concern over the fact that the Bruce Mason Centre was located on the corner of two busy roads in Takapuna which were surrounded by local businesses and restaurants. This would make crowd and traffic control, and separating attending patrons from protestors while preserving public access to other businesses, difficult. There was a high degree of risk to safety if the Centre had to be evacuated. There was concern at the cost of additional security measures. No bond or guarantee had been obtained from Axiomatic to cover such expenses.

[17] Later in the morning the director of Auckland Live, Robin Macrae, made the decision to cancel the event. He identified the competing demands as being the right to protest in a safe environment, Auckland Peace Action's reputation for blocking events it disagreed with and the potential for disruption and violence. Mr Macrae said that he did not want to risk being in breach of his health and safety obligations with the potential for prosecution in that regard, nor to be responsible for anyone being harmed at the event.

[18] RFAL advised Axiomatic of its decision by telephone in the afternoon, giving the reason as a pragmatic one related to security. On 10 July 2018 it wrote formally confirming that decision.

The case in the High Court

The basis for challenge

[19] The proceedings began as a claim for breach of contract by Axiomatic and judicial review by Axiomatic and the appellants. The application for interim relief was withdrawn and Axiomatic took no further steps. The appellants continued their claim for judicial review.[3]

[20] The substantive hearing proceeded on the basis of a third amended statement of claim. It was said that RFAL was the Council's agent and all references to RFAL were to be taken as including the Council. As argued, the decision sought to be impugned was that made on 6 July 2018 that the event should not be held at the Bruce Mason Centre or any of its other venues.[4]

[21] The appellants pleaded that:

> RFAL performs a public function when granting and/or terminating licences to use the Public Venues.

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[3] Initially the Mayor of Auckland, Philip Goff, was named as a respondent on the basis that he had made or dictated the decision under challenge. However, the appellants accepted that the evidence filed on behalf of RFAL and the Council showed this not to be the case and there is no allegation maintained against the Mayor.

[4] The pleadings also identified an alleged representation when advising of the cancellation that no other public venues would be available because of security and safety concerns and/or lack of availability. However, the appeal focussed on the actual decision to cancel.

> In exercising such public functions, RFAL and the Council were and are subject to public law obligations, including making decisions involving such functions on the basis of relevant considerations only, on an appropriately informed basis, without errors of law or fact, and rationally.
>
> In particular, in making such decisions, RFAL and the Council were and are required to facilitate rights to freely express lawful speech and opinions without these being denied or eroded by potential health and safety risks associated with possible physical protests against such speech and opinions where such risks are not founded on cogent and informed evidence following proper investigation and consultation.

[22] It was alleged, first, that the decision to cancel was irrational, perverse and arbitrary and, secondly, that it unreasonably restricted the appellants' common law and BORA-protected rights to freedom of thought and expression, peaceful assembly and association and freedom from discrimination.[5]

The High Court decision

[23] The Judge recorded the appellants' argument that the decision to cancel:[6]

> … engaged "broader public interests" in provision of a public forum – including the *trust's argued objective to promote cultural well-being* ... and involved "a high level of governmental involvement" (in the form of the Council and Mayor) …

[24] The reference to the Trust's "argued objective to promote cultural well-being" is a reference to Regional Facilities Auckland's statement of intent, which included as a stated objective "advancing the social and cultural well-being of Aucklanders". This was heavily relied on in the High Court and before this Court.

[25] However, the Judge did not accept that the objective expressed in the statement of intent imposed any direct obligation on RFAL. Rather, the Trust held a "subsidiary but standalone role"; it was not required to promote community well-being itself, but instead existed to promote "the effective and efficient provision, development and operation" of regional facilities, as provided for by clause 3.2 of RFAL's Trust Deed.[7] The Judge regarded the objective of "promotion" as an outcome of the establishment of the Trust rather than a task for the Trust to undertake.

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5 New Zealand Bill of Rights Act 1990 [BORA], ss 13, 14, 16, 17 and 19.
6 Substantive decision, above n 1, at [32] (emphasis added).
7 At [35]–[36].

[26] The Judge did not see the Trust's principal statutory obligation to "achieve the objectives of its shareholders"[8] as inconsistent with this conclusion:

> [38] A context-free reading of the trust's statutory "principal obligation" – "to achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent" – might be thought to permit the trust to arrogate to itself, by incorporation in the statement of intent, such of the Council's objectives as it sought to achieve. But that would be to disregard the quite careful delineation between Council and trust in their constituent documents.
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> [39] The "deciding" entity for promotion of community well-being, when such is a local government purpose, here is the Council. The separation between Council and trust is reinforced in the latter's statement of intent, which emphasises the Council's objective to provide community facilities and the trust's intention to manage them. That is not to say trust and trustee are immune from judicial review on their cancellation of the event. It remains necessary to identify what public or governmental power they (or the Council) may be said to have exercised in deciding to cancel the event.
>
> (Footnote omitted).

[27] The Judge went on to consider the nature of the power RFAL exercised in cancelling the event and whether public law obligations accrued to it in doing so. He considered that there was no evidence of the Council requiring anything more from the Trust than the functional role reflecting the vesting of the Bruce Mason Centre in RFAL.[9] Significantly, the Judge noted that the Council's own statutory purpose at the time required it to provide good quality public services in a cost-effective way.[10] In the Judge's view:

> [44] … Had I to confront the Council's obligation directly, I would have held "public services" even broadly interpreted still did not extend to the outcome sought by the applicants. Rather, by reference to the since-repealed s 11A,[11] those "public services" then were the more prosaic provision of amenities in which the city's "vision" may be achieved. Even if the Bruce Mason Centre was to be considered a "community amenity" for the purposes of s 11A, its "contribution" was not expressly to be in promotion of community well-being, but in provision of good-quality public services in a cost-effective way. …

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8 Local Government Act 2002, s 59(1)(a) [LGA 2002].

9 Substantive decision, above n 1, at [42].

10 At [43], referring the Local Government Act 2002 Amendment Act 2012, s 7.

11 Section 11A of the LGA 2002, which was repealed in 2019, identified the core services local authorities were to have particular regard to as network infrastructure, public transport services, solid waste collection and disposal, the avoidance or mitigation of natural hazards and libraries, museums, reserves and other recreational facilities and community amenities.

> [45] In the end, it was not for the trust proactively to pursue the Council's activities. Rather, it was for the Council to devolve such to the trust, if the Council can and decides to do so. There is nothing in the trust's constituent documents to suggest the Council here has put any direct responsibility for community well-being with the trust. Instead the trust's express responsibility is to provide services on the Council's behalf, with only discretionary obligation to have regard for "the interests of the community" (and even then not more proactively to promote community well-being).
>
> (Footnotes omitted).

[28] In these circumstances, the Judge concluded that RFAL did not exercise a public power in cancelling the event.[12] Nor, for the same reasons, did the Judge consider that RFAL was exercising any public power that would engage BORA.[13]

Issue 1: is the decision to cancel reviewable?

The issues

[29] Mr Hodder QC, for the appellants, submitted that RFAL is properly viewed as the Council's agent and, in managing the Bruce Mason Centre, was carrying out local governmental functions. He argued that the Judge erred in reasoning by reference to whether the Council had "devolved" its powers to RFAL through the Trust so that RFAL was providing services on the Council's behalf; it effectively "stood in the shoes" of the Council. He submitted that a public body ought not to be able to avoid scrutiny by the courts by simply conferring its powers and functions on other entities over which it continues to exercise control.

[30] If RFAL is held to be the Council's agent, Mr Hodder submits that the correct focus is on whether the power being exercised was in substance public. Because of the nature of the event, BORA is engaged in relation to the right to freedom of expression and other rights and reviewable on usual principles. If RFAL is held not to be the Council's agent, the decision is nevertheless reviewable on the usual principles on the basis that it had important public consequences. The appellants' arguments rested, essentially, on the fact that the assets RFAL owns and manages are public assets and on the express objective in RFAL's statement of intent to advance the cultural well-being of Aucklanders.

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12 At [46].
13 At [54]–[55].

[31] RFAL accepts, in principle, that a decision made by it could be amenable to review. But it does not accept that it is the Council's agent. Nor does it accept that, even if it were held to be the Council's agent, the decision to cancel the VHA is reviewable. It says that the correct focus should be on the fact that the decision was made in the context of a commercial contract and, as such, is only amenable to review in limited circumstances where there has been fraud, bad faith, corruption or the like, none of which exist in this case.

[32] These arguments raise two distinct issues. First, is RFAL's status merely subsidiary, as the Judge found, or is it properly viewed as a public body under public law principles and for the purposes of s 3(b) of BORA? Secondly, is the decision to cancel reviewable? Answering the first question does not answer the second, which depends on the nature of the decision and the context in which it was made.

The statutory context

[33] Determining whether RFAL is properly viewed as the Council's agent requires a full explanation of the statutory context in which RFAL was established and continues to operate.

[34] In 2018, when RFAL cancelled the VHA, the statutory purposes of local government in New Zealand were:[14]

> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

[35] The role of a local authority is to give effect to the statutory purposes of local government (obviously as they stand at the relevant time) and to perform the duties and exercise the rights conferred on it by or under the Local Government Act 2002

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[14] In 2010, when the Trust was established, s 10 of the LGA included as one of the purposes of local government "to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future". The formulation that stood in 2018 was inserted by the Local Government Amendment Act 2012, s 7. In 2019 the purpose was changed again, reverting to the previous formulation.

(LGA 2002) and any other enactment.[15] Local authorities must adopt a long-term plan, one purpose of which is to provide integrated decision-making and co-ordination of the resources of the local authority.[16]

[36] Local authorities may establish CCOs and transfer some of their undertakings to those organisations. CCOs are required to produce a statement of intent and their decisions must be made in accordance with that document.[17] They are subject to performance monitoring by the local authority, including as to achievement of the desired results as set out in the statement of intent, which the local authority must either agree to or take steps to modify.[18] CCOs have as a principal objective to "achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent".[19]

[37] In 2010, local government in the Auckland region was reorganised to create what is commonly known as the Auckland "super city". This was achieved by the Local Government (Tamaki Makaurau Reorganisation) Act 2009, the Local Government (Auckland Council) Act 2009 (LGA 2009) and two orders in council, the Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010 (Organisations Order) and the Local Government (Tamaki Makaurau Reorganisation) Council-controlled Organisations Vesting Order 2010 (Vesting Order).

[38] LGA 2009 introduced a new form of CCO, the substantive council-controlled organisation (SCCO) for the purposes of the reorganisation. The definition of a SCCO includes a CCO that owns or manages assets valued at more than $10 million.[20] Regional Facilities Auckland was established as a CCO under the Organisations

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15 LGA 2002, s 11.
16 Section 93(6)(c).
17 Sections 60 and 64 and sch 8.
18 Section 65.
19 Section 59(1)(a).
20 Local Government (Auckland Council) Act 2009 [LGA 2009], s 4(1).

Order.[21] RFAL is the Trustee,[22] vested with a variety of regional assets (including the Bruce Mason Centre).[23] These assets are worth well over $10 million and RFAL is, accordingly, a SCCO.

[39] The statutory objectives of the Trust include, relevantly:[24]

> … to support the vision of Auckland as a vibrant city that attracts world class events and promotes the social, economic, environmental, and cultural well-being of its communities, by engaging those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport, and entertainment activities …

[40] The Trust Deed establishing Regional Facilities Auckland was required to (and did) contain a statement of purposes that reflected its statutory objectives:[25]

> **3.2 Charitable Purposes of the Trust**: In order to:
>
> **(i) Engaging the Communities of Auckland:** support the vision of Auckland as a vibrant city that attracts world class events and enhances the social, economic, environmental, and cultural well-being of its communities, by providing Regional Facilities throughout Auckland for the engagement of those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport, and entertainment activities: and
>
> **(ii) Providing world class Regional Facilities:** develop and maintain, applying a regional perspective, a range of world class arts, culture, heritage, leisure, sport, and entertainment venues that are attractive both to residents of and visitors to Auckland;
>
> the Trust has been established, and is to be maintained, to promote the effective and efficient provision, development and operation of Regional Facilities throughout Auckland for the benefit of Auckland and its communities (including residents of and visitors to Auckland) and in particular:
>
> (c) **Development and Operation of Regional Facilities:**[26] to promote, operate, develop and maintain, and to hold and

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21 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010 [Organisations Order], cl 9(1). The Trust was one of six structures directed by the Organisations Order, the others being the Waterfront Development Entity, Auckland Council Investments Ltd, Auckland Council Investments (AIAL) Ltd, Auckland Council Property Ltd and Auckland Tourism, Events and Economic Development Ltd.

22 Organisations Order, cls 9(4) and (5).

23 Local Government (Tamaki Makaurau Reorganisation) Council-controlled Organisations Vesting order 2010, cl 14.

24 Organisations Order, cl 9(3)(a).

25 Clause 9(2).

26 "Regional Facilities" include venues that are entertainment facilities, such as the Bruce Mason

> manage interests and rights in relation to, Regional Facilities throughout Auckland, and to promote and co-ordinate strategic planning in relation to the ongoing development and operation of such facilities;
>
> (d) **Provision of High Quality Amenities:** to provide, and to promote the provision of, high quality amenities at Regional Facilities throughout Auckland that will facilitate and promote arts, cultural, heritage, education, sports, recreation and leisure activities and events in Auckland which attract and engage residents and visitors; and
>
> (e) **Prudent Commercial Administration:** to administer, and to promote the administration of, Regional Facilities throughout Auckland on a prudent commercial basis, so that such facilities are operated as successful, financially sustainable community assets.

[41] The statutory objectives of RFAL as Trustee include "to ensure that Regional Facilities Auckland is administered, and its property held, for the purposes set out in the deed of trust" and "to undertake any activities, in accordance with the deed of trust, that further those purposes".[27] As a SCCO, RFAL is also required to give effect to the relevant aspects of the Auckland Council's long-term plan and to act consistently with the relevant aspects of any other plan or strategy of the Council to the extent specified by the Council.[28] It is subject to the Council's policy on the accountability of SCCOs, which includes a statement of the Council's expectations in respect of each SCCO's contributions to and alignment with the Council's objectives and priorities.[29]

[42] The Council's accountability policy describes its relationship with its SCCOs as one of partnership.[30] It states as one of the core principles guiding the operation of SCCOs that the public will hold the Council accountable for the actions of its SCCOs.[31] Its expectation of Regional Facilities Auckland includes that:[32]

> RFA shall assist Auckland Council in the delivery of the Auckland Plan and its Development Strategy with the equitable provision of cultural, heritage and lifestyle opportunities in the everyday lives of Auckland's residents and

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Centre. Under cls 14(1) and (2) and sch 3, pt 1 of the Vesting Order, various assets were vested in RFAL as Trustee. This included the property known as the Bruce Mason Centre. Other assets to be vested included the Auckland Art Gallery Toi o Tāmaki, Auckland Stadiums, the Auckland Zoo, the Civic Theatre and the Aotea Centre.

27 Organisations Order, cl 9(6).

28 LGA 2009, s 92.

29 Section 90(2)(a).

30 Auckland Council *Governance Manual for Substantive CCOs* (December 2015) at 65.

31 At 6.

32 At 69.

visitors. This shall be facilitated through RFA's management of assets and the funding decisions made by RFA to support cultural and social activities.

[43] The Trust Deed also sets out the respective roles of RFAL and the Council. Relevantly:

> **4.1** **Role of Trustee**: Subject to the terms set out in this deed, the Trustee will have overall control of, and responsibility for, the Trust Fund and the administration of the Trust, and the affairs of the Trust will be managed by, or under the direction or supervision of, the Trustee.
>
> **4.2** **Role of Auckland Council**: Acting in accordance with its role as local authority for Auckland, the role of the Auckland Council in relation to the Trust is to oversee the conduct of the Trustee and to exercise its powers under the terms of this deed (in addition to any rights and obligations of the Auckland Council under any of the Local Government Acts or otherwise) to protect the public interest, and in particular the interests of Auckland and its communities, in relation to the Trust Fund and the proper administration of the Trust.

[44] RFAL's statement of intent for the relevant period stated:

> Regional Facilities Auckland Limited's primary activity is to act as a corporate trustee for Regional Facilities Auckland, a charitable trust and one of six substantive Auckland Council Controlled Organisations.
>
> RFA supports Auckland Council's vision for Auckland as a vibrant, dynamic, international city by providing a regional approach to running and developing Auckland's arts, culture and heritage, natural environment, leisure, sports and entertainment sectors.
>
> RFA's role includes:
>
> - advancing the social and cultural well-being of Aucklanders
> - contributing to the growth of the Auckland economy
> - being trusted stewards of our venues and collections
>
> RFA does this by:
>
> - assisting Auckland Council in the delivery of the Auckland Plan and its Development Strategy with the equitable provision of cultural, heritage and lifestyle opportunities in the everyday lives of Auckland's residents and visitors. This is facilitated through RFA's management of assets and the funding decisions made by RFA to support cultural and social activities.
> - taking a regional perspective to the provision of social and community infrastructure

- recognising Government as a strategic partner and aligning with policy and funding for arts, culture, heritage and cultural institutions that is targeted at the regional level.

- promoting Auckland's Māori identity as Auckland's point of difference in the world and lifting Māori social and economic well-being by developing new economic opportunities with Māori business interests.

RFAL's status

[45] We agree with the appellants that the Judge's focus on the wording of the Organisations Order and the Trust Deed obscured an important aspect. The overall scheme of the LGA 2002 and LGA 2009 is that some local government decision-making will be undertaken by CCOs. Whilst policy considerations and objectives are set by the local authority and CCOs are subject to governance by the local authority, CCOs may make decisions that would otherwise be made by the local authority.

[46] In the case of the Auckland Council, a convenient place to start is the Report of the Royal Commission on Auckland Governance, which formed the basis for the reorganisation of the Auckland Council.[33] The Commission considered the function and effectiveness of CCOs under the LGA 2002 at some length and concluded that:

> 21.45 The Commission anticipates that in future the Auckland Council's major commercial trading and infrastructure activities as set out below will be undertaken through CCOs.
>
> 21.46 For the Auckland Council to plan and deliver the infrastructure and services to meet its requirements, it will need access to the best commercial and engineering expertise and resources. CCO structures and boards of directors can bring these required skills and expertise.

[47] The Commission considered that six major commercial infrastructure CCOs would be required. One would manage major events facilities, including the Bruce Mason Centre.[34] These CCOs would operate at arm's length from the Auckland Council, have independent professional boards that would be accountable for their performance and be subject to best commercial governance and reporting practices.[35]

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33 Peter Salmon, Margaret Bazley and David Shand *Royal Commission on Auckland Governance* (March 2009).
34 At [21.48].
35 At [21.54].

[48] The LGA 2009, Organisations Order and Vesting Order reflect these expectations. The scheme of the reorganisation is for SCCOs such as RFAL to take full responsibility for the relevant infrastructure. We do not agree that the statutory objective of the Trust to support the vision of Auckland indicates some lesser role. The vision RFAL is charged with supporting is very wide and, self-evidently, encompasses facets of the city entirely divorced from the scope of its activities. More important in the present case are the purposes of RFAL set out in the Trust Deed at subcls 3.2 (c), (d) and (e); these identify the specific ambit of RFAL's activities. In our view RFAL's purposes do not indicate that the nature of its operation is merely supportive but, rather, they show that RFAL is independently responsible for all aspects of the operations that fall within its purview. Given that the assets in question are legally vested in RFAL, its purposes to provide, promote, operate, develop and maintain those assets could hardly be wider.

[49] Nor do we consider that the Trust's statutory obligation to achieve the objectives of its shareholders as specified in the statement of intent[36] conveys some lesser role for the Trust, with the Council as the "deciding" entity and the Trust's role being simply to manage. That view would be entirely inconsistent with the fact that it is RFAL that owns the assets and the Council that is required either to agree to or modify the statement of intent.[37] The scheme contemplates that, once the Council has committed itself to certain objectives (by agreeing to the statement of intent), the Trust has both the power and obligation to achieve those objectives. Subject only to governance for the purposes of ensuring compliance with the statement of intent, and to policy guidance in the form of the accountability policy, the long-term plan and any other relevant plans or strategies, the decision-making power in relation to the subject assets lies with RFAL.

[50] We agree with the appellants' submission that, in relation to the assets it holds, RFAL stands in the shoes of the Auckland Council.

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36 LGA 2002, s 59(1)(a).
37 Section 65(2).

Is the decision to cancel reviewable and on what basis?

[51] The fact that RFAL was the Council's agent for all relevant aspects of management of the Bruce Mason Centre does not, in itself, mean that the decision to cancel is reviewable; that question turns on whether the power RFAL was exercising when it cancelled the event was, in substance, public. The management of such an asset entails all manner of decisions. Some are prosaic — maintenance, cleaning, catering, for example. They are plainly not reviewable because they have no public character. But the appellants say that the decision to cancel the VHA is reviewable because it relates to a service that local governments have traditionally provided, i.e. town halls and similar venues for public meetings and debates. It is, in substance, public and, for BORA purposes, made pursuant to a public function or power in circumstances that engage BORA rights. Key to this submission are the value of public discourse and RFAL's role in controlling a venue used for that purpose.

[52] It has now long been the case that the reviewability of a decision depends on the nature of the decision rather than the nature (public or private) of the decision-maker. In *Royal Australasian College of Surgeons v Phipps* this Court said that:[38]

> Over recent decades Courts have increasingly been willing to review exercises of power which in substance are public or have important public consequences, however their origins or the persons or bodies exercising them might be characterised … The Courts have made clear that in appropriate situations, even although there may be no statutory power of decision or the power may in significant measure be contractual, they are willing to review the exercise of the power …

[53] The approach is essentially the same in relation to decisions that engage BORA, which applies only to acts done by the legislative, executive or judicial branches of government or by "any person or body in the performance of any public function, power or duty conferred or imposed on that person or body by or pursuant to law".[39] The approach taken in cases decided in the BORA context is to focus on the nature of the act in issue. In *Ransfield v Radio Network Ltd*, which concerned the

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[38] *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA) at 11–12, citing *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 (CA) at 159–160. See also *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

[39] BORA, s 3(b).

reviewability of a decision by a commercial radio station to ban individuals from access to its talk-back programme, Randerson J observed that:[40]

> Given the many and varied mechanisms modern governments utilise to carry out their diverse functions, no single test of universal application can be adopted to determine what is a public function, duty or power under s 3(b). In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it "governmental" in nature or is it essentially of a private character?

[54] The Judge went on to identify a number of helpful indicia: whether the entity is publicly owned or is privately owned and exists for private profit; whether the source of the function, power or duty is statutory; the extent and nature of any governmental control; the extent of public funding in respect of the function in issue; whether the entity effectively stands in the shoes of the government in exercising the function, power or duty; whether the function, power or duty is being exercised in the broader public interest as distinct from merely being of benefit to the public; whether coercive powers analogous to those of the state are conferred; whether the functions, powers or duties being exercised affected the rights, powers, privileges, immunities, duties or liabilities of any person; whether the powers being exercised are extensive or monopolistic; and whether the entity is democratically accountable.[41]

[55] Ms Anderson, for the respondents, accepted the correctness of these principles generally but said that RFAL's decision to cancel was not one that was, in substance, public and nor was RFAL acting in the performance of a public function when it made the decision. She argued that the decision was made in a commercial context (a standard contract for venue hire) and that commercial decisions are reviewable only in limited circumstances, none of which apply here. This submission rested on the line of cases beginning with *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd*, in which the Privy Council considered that, whilst the decisions of a state-owned enterprise could be the subject of judicial review:[42]

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40 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at [69(f)], endorsed in *Low Volume Vehicle Technical Assoc Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 (CA) at [25].

41 At [69(g)].

42 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 391.

> It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith.

[56] In cases decided since *Mercury Energy*, however, this Court and the Supreme Court have signalled that the circumstances in which judicial review is available in respect of contractual decisions by public bodies is not so narrow.

[57] *Lab Tests Auckland Ltd v Auckland District Health Board* concerned the tendering process adopted by three district health boards for the provision of pathology services.[43] The incumbent but unsuccessful tenderer challenged the outcome on the grounds of procedural unfairness in the tendering process (alleging a conflict of interest by the successful tenderer). Arnold J, writing for the majority, considered that *Mercury Energy* indicated that the courts will intervene by way of judicial review in relation to contracting decisions made by public bodies in a commercial context in limited circumstances, though that is subject to context.[44] On the question of context he said later that:

> [85] … In assessing the standard of review (or scope of the procedural obligations) to be applied, it is necessary to look at the nature of the public body, the particular function being performed, the context within which that function is being performed and what it is said has gone wrong. …
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> …
>
> [91] Clearly, judicial review will be available where there is fraud, corruption or bad faith. Further, we accept, as a matter of principle, that it may be available in analogous situations, such as where an insider with significant inside information and a conflict of interest has used that information to further his or her interests and to disadvantage his or her rivals in a tender. In such a case it may be that the integrity of the contracting process has been undermined in the same way as in the case of corruption, fraud or bad faith. …

[58] In reaching that view, the Court expressly rejected the applicants' effort to extend the *Mercury Energy* formulation to encompass any other material departure from accepted public sector ethical standards, commenting that such "open-ended formulation is not, in our view, consistent with the authorities, or, in the present case, with the statutory context".[45]

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43 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776.
44 At [57]–[59].
45 At [92].

[59] In *Ririnui v Landcorp Farming Ltd*, however, the Supreme Court held that judicial review of a commercial decision by a state-owned enterprise, Landcorp, ought not to be limited to the situations contemplated by *Mercury Energy* because of the particular context in which the decision was made.[46] The case concerned a challenge to Landcorp's decision to sell a block of land following erroneous advice from the Office of Treaty Settlements that it did not require the land for any Treaty settlement. The parties had not challenged the position in *Lab Tests* regarding the limited circumstances in which the decision of a state-owned enterprise could be reviewed. Nevertheless, the majority of the Supreme Court observed that:[47]

> … even if that proposition is accepted, it does not necessarily apply to all contracting decisions made by state-owned enterprises. We see the present case as falling outside the general proposition because we do not accept that this was an ordinary commercial transaction, given the special context of former Crown land, the Treaty and Māori interests.

[60] *Attorney-General v Problem Gambling Foundation of New Zealand* was also decided in the context of a procurement process, this time by the Ministry of Health in respect of public health services to address problem gambling.[48] This Court confirmed that judicial review of a procurement contract entered into by a public body is generally not available unless the applicant can point to fraud, corruption, bad faith or like conduct. Winkelmann J (as she then was) reiterated that:

> [41] … where the decision the subject of review is a procurement (contracting) decision made in a commercial context, that is the starting point for consideration of the appropriate scope of review. … It follows the prima facie position will be that only narrow review is appropriate, subject to any relevant contextual matters indicating a need for the High Court to have broader powers of review.
>
> [41] This Court identified relevant contextual matters in *Lab Tests* … To those we would also add the nature of the interest sought to be protected by the party seeking judicial review. We say this because it may be that a decision taken in a commercial context by a state actor does entail wider public interest considerations, suggesting that a broader scope of review will be appropriate … But to avail itself of that broader scope of review, the applicant for review must raise issues relevant to that public interest and not just be a disappointed commercial party, seeking to take advantage of public remedies in a commercial context.

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46 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

47 At [65].

48 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470.

(Footnote omitted).

[61] As Ms Anderson argued, the immediate context of the cancellation was unquestionably commercial. The VHA was for the hire of a theatre-style venue at commercial rates for a performance that could only be accessed by ticket-holders, where the cost of the tickets was set on a commercial basis and the performance had other commercial features such as the offering of merchandise. The venue hire was agreed on the basis of a standard hire agreement and in accordance with RFAL's usual practices. Once the suitability of the venue (e.g. in terms of location and capacity) and availability were established, only basic information was obtained — contact details, the name of the person authorised to enter the hire agreement and generic information about the nature of the event. In this case, the account manager concerned only knew that there would be two keynote speakers and a "question and answer" session. The standard form agreement contained provisions permitting RFAL to cancel in specified circumstances, which included where the management or control of the event could lead to danger or injury or damage to any person or damage to property.

[62] But beyond the contract itself, the wider context is not comparable to the cases in which the narrow approach to the availability of judicial review has been taken. RFAL is not required to administer its assets on a competitive commercial basis (as was the position with the state-owned enterprises in *Mercury Energy* and *Ririnui*).[49] Rather, under the Trust Deed it is required to administer its assets on a *prudent* commercial basis so that they are "operated as successful, financially sustainable community assets". Although RFAL makes it clear in its statement of intent that it "operates a commercial business model" and most of the Trust's operating revenue (around 70 per cent) comes from commercial activities, including venue hire, the balance comes from funding by the Auckland Council and not all of RFAL's venues are operated with the same degree of commerciality; its aim is to maximise profits in order to cover costs and be able to accommodate non-commercial activities, including low-cost and free events. Mr Macrae, the director of Auckland Live, said in his evidence that "RFAL's decisions to accept a booking are commercial decisions, and generate revenue to enable RFA to carry out its charitable purposes".

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[49] State-Owned Enterprises Act 1986, s 4.

[63] Nor is the nature of the VHA quintessentially commercial in the same way as the tendering processes in *Lab Tests* and *Problem Gambling.* Those contracts were entered into to enable the district health boards and the Ministry of Health to fulfil their respective statutory functions of providing health services and implementing an integrated problem gambling strategy. In comparison, the hiring out of venues is not collateral to RFAL's core statutory function of managing the assets vested in it but part of that core statutory function; the venues that Auckland Live manages exist specifically to be used for live performances and the usual way of achieving that is by hiring them out. Moreover, the effect of cancelling a VHA is not limited to those directly interested in the contract. Unlike *Lab Tests* and *Problem Gambling*, where the dispute was between the decision-makers and the unsuccessful tenderers, cancelling a venue directly affects those members of the public who are (or who planned to be) ticketholders. It also has the indirect effect on prospective users of the venue who must assess how secure they will be if they hire the venue in the future.

[64] Thirdly, and at the heart of the appellants' case, RFAL's statutory function of providing venues for live performances engages rights protected at common law and under BORA.[50] The appellants rely on the BORA-protected rights to freedom of expression,[51] thought,[52] peaceful assembly,[53] association[54] and freedom from discrimination.[55] They say that these rights were mandatory considerations, that RFAL failed properly to consider them and the decision to cancel the event was inconsistent with them. We consider that only the rights of freedom of expression and peaceful assembly are engaged.[56]

[65] Under s 14 of BORA, the right to freedom of expression includes the right to seek, receive and impart information and opinions of any kind in any form. This right is recognised as one of the essential foundations of a democratic society.[57] The breadth

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50 It was not contended that the common law rights relied on would add anything to the appellants' case and, for convenience, we refer only to the BORA rights.
51 BORA, s 14.
52 Section 13.
53 Section 16.
54 Section 17.
55 Section 19.
56 Later we explain why we consider that the other rights relied on are not engaged.
57 *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 at [13] per Lord Sumption.

of the right has been described as being "as wide as human thought and imagination".[58] It includes non-verbal and symbolic conduct as well as expression through speech and writing, provided that the conduct conveys, or attempts to convey, something to others.[59] By its nature, live performance — whether theatre, music, dance, debate or lecture — involves forms of expression protected by BORA. The present case concerns the type of expression readily understood as protected by BORA; the speakers wished to express their political views and those interested in their views had the right to hear them being expressed. We consider it incontrovertible that the right to freedom of expression was engaged when RFAL decided to cancel the event.

[66] We also accept that the right to peaceful assembly was engaged. This right tends to be considered in relation to those who wish to protest, rather than those who are the object of protest.[60] However, those wishing to assemble for a purpose likely to attract protest are equally entitled to do so as those protesting. The right to peaceful assembly may be viewed as a corollary to the right to freedom of speech.[61] In the circumstances of this case, which are akin to those in *Verrall v Great Yarmouth Borough Council,*[62] we think that is the proper approach. We add, however, that we do not see this right as making any practical difference to the obligations on RFAL; in the circumstances of this case the right to peaceful assembly involves the same considerations as the right to freedom of expression.

[67] Society places a high value on freedom of expression and RFAL has the power to control public assets that are used for many forms of expression. The decision to cancel was made pursuant to a core statutory function and would directly affect the BORA rights of members of the public who wished to attend the event. That is the proper context in which to view RFAL's decision to cancel the VHA. It ought not to be treated as merely a commercial decision subject to the same limitations for review as apply to ordinary commercial decisions that have only commercial consequences.

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58 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].
59 *Attorney General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [46].
60 See, for example, *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91; *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1; and *Police v Beggs* [1999] 3 NZLR 615 (HC).
61 *Watchtower Bible & Tract Society v Mount Roskill Borough* [1959] NZLR 1236 (SC) at 1242.
62 *Verrall v Great Yarmouth Borough Council* [1981] QB 202 (CA).

[68] We therefore differ from Jagose J and find that RFAL's decision to cancel the VHA falls outside the parameters contemplated by *Lab Tests* and *Problem Gambling*. It should be treated as occupying a special position and reviewable both on the usual public law principles and subject to s 3(b) of BORA.

Did the decision to cancel have important public consequences?

[69] In the event that the argument regarding the public nature of the decision and the application of BORA failed, the appellants argued as an alternative that the decision is reviewable on the basis that it had important public consequences, relying on the approach taken in *Dunne v CanWest TVWorks Ltd* which concerned the decision by a private television station to exclude a minor political party from a pre-election debate.[63] Ronald Young J considered that by undertaking the debate, which had the prospect of significantly influencing the outcome of the election, the television station had put itself into the public arena and, applying the *Phipps* "impact test", considered that the decision to include only some political leaders would have important public consequences.[64] The Judge concluded that "this is one of those comparatively rare cases where a private company is performing a public function with such important public consequences that it should be susceptible to review".[65]

[70] However, our conclusion regarding RFAL's status means that it is unnecessary to consider this argument.

Common callings

[71] Our conclusion also makes it unnecessary to address the appellant's argument that the decision is reviewable by analogy with the common law doctrine of "common callings".

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63 *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC).
64 At [34].
65 At [36].

Issue 2: was the decision unlawful by reason of it being irrational, perverse or arbitrary?

The issues

[72] The reason RFAL gave for cancelling the venue hire agreement was concern that RFAL would be unable to discharge its obligations under the Health and Safety at Work Act 2015, either at all or at a reasonable cost. The appellants say that the decision to cancel was irrational, perverse and arbitrary (or in other words, unreasonable) and therefore unlawful because (1) it was made prematurely and without adequate information about security arrangements, (2) RFAL failed to follow its own health and safety policy, (3) the decision represented an effective "heckler's veto" and (4) RFAL misdirected itself on the nature of the free speech rights that were engaged.

The events leading up to the decision to cancel

[73] The events leading up to the decision to cancel were the subject of extensive evidence from RFAL personnel. On 13 June 2018 a director of Axiomatic, Mr Izaak, contacted RFAL. Wendy Pafalani, an account manager, spoke to Mr Izaak and arranged the booking for 3 August 2018. Ms Pafalani deposed that Mr Izaak said nothing about likely security risks. He did not initially tell her the names of the performers, he only said there would be two keynote speakers. He did not give details about the arrangements that had been made for the Australian leg of the tour. Another director of Axiomatic, Mr Pellowe, provided an affidavit and asserted that Mr Izaak had provided some details of the security arrangements in place for the Australian tour. Ms Pafalani does not accept that and produced the notes she made of the conversation, which say nothing about security. Mr Izaak did not provide any affidavit in response. In these circumstances, we proceed on the basis that Ms Pafalani's evidence is correct.

[74] The terms of the VHA required Axiomatic to file a health and safety plan no later than 10 working days prior to the event, i.e. by 19 July 2018. Axiomatic was still working on that plan when the decision was made to cancel the event and the plan (or draft) was never provided to RFAL.

[75] Soon after the tickets went on sale on 29 June 2018, RFAL became aware of complaints about the event. Initially there were complaints in the form of telephone

calls and emails. These developments were monitored by Mr Crighton, the Manager of Presenter Services at Auckland Live, who had approved the VHA and signed the contract on behalf of Auckland Live. Mr Crighton checked online to find out which venues were being used in Australia so that he could talk to the managers of those venues. However, he could find only ticket prices; there were no details of venues. At that stage he thought that there were only a small number of complaints, which was not uncommon for political speaker events. He decided to monitor the level of complaints and speak directly to anyone who wanted to complain to Auckland Live.

[76] By 5 July 2018 the number of complaints, including by Twitter and Facebook posts, had increased. An online petition to cancel the event had been started. Mr Crighton thought it prudent to flag the event to Auckland Live's Manager of Safety and Security, Dean Kidd. Mr Kidd was to gather further information and report back, including on risk rating and mitigation strategies. As part of that Mr Kidd planned to contact the police to check whether the event was on its radar and to discuss security issues.

[77] By the afternoon of 5 July 2018 Mr Crighton still considered that the complaints were not out of the ordinary for an event that involved political discussions but thought it prudent to find out more. As part of establishing what sort of security precautions might be needed, he looked again at the Axiomatic website to find out what venues were being used for the Australian leg of the tour. He wanted to find out how other venues were managing the security concerns and planned to contact them to discuss that. This is a course he had taken in relation to previous events that attracted public complaints. However, still none of the Australian venues were identified on the Axiomatic website.

[78] Mr Crighton asked Ms Pafalani to contact Axiomatic for information about the Australian venues. The response was that the venues were not available online but only advised to ticket holders 24 hours before the event. This was very unusual in Mr Crighton's experience; it had never happened with any event in which he had been involved. Mr Crighton said, "I became concerned that there was more to this than just

the odd public complaint". Mr Crighton raised his concerns with the director of RFAL, Mr Macrae.

[79] On the evening of 5 July 2018, Auckland Live received an email from Auckland Peace Action which expressed the view that hosting the event might be a breach of the Human Rights Act 1993, outlined facts about the views previously expressed by Ms Southern and Mr Molyneux and said that "there is simply no other choice but to refuse the use of the venue for these purposes".

[80] Just after 9 am on 6 July 2018, Auckland Live received a copy of a press release issued by Auckland Peace Action that morning. It stated that "If [Stefan Molyneux and Lauren Southern] come here, we will confront them on the streets. If they come, we will blockade entry to their speaking venue".

[81] At about 9.15 am on 6 July there was a meeting involving Mr Macrae, Mr Crighton and other Auckland Live personnel to discuss the concerns arising from these developments and what action should be taken. By the end of the meeting Mr Macrae had formed the preliminary view that he would need to cancel the event on health and safety grounds. Mr Macrae said that it was uncommon for RFAL to cancel a VHA and that it does not do so because the content of an event may be controversial or offensive to some people. It has no formal policy to assess the content of a venue booking; its only interest is in facilitating a venue and ensuring that the event proceeds without risk of injury or damage to its venues.

[82] Mr Macrae identified a number of factors as relevant to the assessment of the likely risks if the event proceeded. The first was the location of the venue given Auckland Peace Action's signalled intention to blockade the event. Mr Macrae had previous experience with a protest blockade involving Auckland Peace Action and considered there was a reasonable likelihood of disruptive protests, potentially both in and outside the venue. The Bruce Mason Centre occupies a corner site in a busy part of Takapuna. Its direct street frontage gives onto a relatively narrow street where there are other businesses, including cafés and restaurants. Mr Macrae considered that the road would need to be closed and barricades erected for crowd control. This would add an estimated $30,000 to the cost of the event for Auckland Live in terms of security

staff, fencing, traffic management and provision for business disruption to local restaurants and other businesses. No bond or guarantee had been obtained from Axiomatic because, on the information provided by the promoter, there had been no reason to think that would be needed.

[83] Secondly, although only 68 tickets had been sold at that point, tickets could continue to be purchased prior to the event, including by protestors. Mr Macrae considered what would happen if there were between 100 and 500 ticket holders inside the venue, along with potentially hundreds of protestors outside the venue. This required consideration of what would happen if the venue had to be evacuated, for example in the event of a bomb threat or smoke alarms being triggered, and access for emergency vehicles. Mr Kidd was consulted; he considered there was a high degree of risk to safety in the event of evacuation.

[84] Also relevant was the fact that Axiomatic had taken a different approach to publicising the venue in Australia. Mr Macrae considered the fact that the venue had been publicised in New Zealand had a direct and limiting effect on how the security concerns could be managed in relation to the Bruce Mason Centre.

[85] By 11 am, having considered the information before him, Mr Macrae made the decision to cancel the event. Clause 13.2 of the VHA entitled RFAL to cancel in specified circumstances:

> 13.2 **Cancellation by Us:** We may cancel Your booking and terminate this Agreement at any time by notice in writing to You (with immediate effect) if any of the Default Circumstances apply.

[86] "Default Circumstances" was defined in the contract as including where:

> We consider that the management or control of the Event is inadequate and/or the behaviour of any of Your Representatives could lead to:
>
> **(i)** danger or injury to any person;
>
> **(ii)** damage to any property (including the Venue);
>
> …

[87] Mr Macrae advised Axiomatic of the decision to cancel by telephone on 6 July 2018. A formal letter of advice was sent on 10 July 2018. It did not specify cl 13.2 but it is clear from the terms of the letter that this was the basis for the decision:

> Since the time the Agreement was entered into, RFA has become aware of information that has led us to the conclusion the Event cannot be hosted at an RFA venue, without posing an unacceptable risk to the security and safety of the presenters, RFA staff, contractors, and patrons attending the Event.

Was the decision made prematurely and without adequate information?

[88] Mr Hodder submitted that the decision was unreasonable because it was made prematurely and without sufficient information. He relied on this Court's statement in *CREEDNZ Inc v Governor-General* that the question for the Court was:[66]

> … did the [decision-maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable it to answer it correctly?

[89] In argument, Mr Hodder accepted that RFAL had asked the right question; Mr Macrae said in his affidavit that he considered the free speech issue and how to balance that interest with RFAL's obligations regarding the health and safety of staff, patrons, protestors and the wider community. The criticism was, rather, that the decision had been made without proper consultation with Axiomatic, or advice from the police, as to the security risk and appropriate steps that could be taken. It should therefore be regarded as having been made on the basis of a material mistake or with disregard of a material fact.[67]

[90] The respondents maintain that the decision was reasonable given the available information and relies as a cross-check for its reasonableness on expert evidence from an experienced security consultant, Mr Collins. He expressed the view that the increase in risk between 3 and 6 July 2018 and the increase in awareness of the vulnerability of the venue made the event as planned unsuitable without significant additional work regarding security, safety and traffic management.

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66 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 197, citing *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) at 1064 per Lord Diplock.

67 Harry Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare (eds) *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [11-051].

[91] Mr Hodder pointed out that Mr Kidd had contacted the police on the morning of 6 July 2018 for the purposes of gathering further intelligence in order to advise on risk and mitigation strategy. That exercise had not been completed by the time the final decision to cancel was taken on the morning of 6 July 2018. He also pointed to Mr Macrae's advice to Axiomatic of the decision to cancel in which he said "we've had some early conversations with the police" whereas, in fact, no conversations had actually taken place at that point. Notably, the police themselves had not received any threats in relation to the event.

[92] We do not see the failure to wait for input from the police as undermining the basis for the decision to cancel. It seems clear from the evidence that the concern was over the practicalities, including cost, of protecting the venue, managing the disruption to local businesses and ensuring the safety of those inside the venue in the event of evacuation. These were not necessarily matters on which police input would have assisted and we note that the appellants do not identify any advice or action likely to have been provided by the police that could have affected the decision. There was no challenge to Mr Crighton's estimate of the cost that would be involved and in that regard it was relevant that Axiomatic had not been asked for a bond to cover security or damage costs.[68]

[93] The second aspect was RFAL's failure truly to engage with Axiomatic about its ability to manage the event before deciding to cancel. During the telephone call from Mr Macrae to Mr Pellowe advising of the decision to cancel, Mr Pellowe and Axiomatic's head of security asked whether Axiomatic's security team could do anything to address the security concerns. Mr Macrae did not take up that invitation, indicating that the decision was already made. We do not regard Mr Macrae's refusal as making the decision unreasonable. It is evident that the level of opposition, and therefore risk, had escalated over the course of the week since the tickets went on sale. What had started out as a small number of disparate complaints by members of the public had become a concerted plan by organised protestors to disrupt the event. Mr Collins makes the point that the escalation in the level and nature of complaints

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[68] Interestingly, Mr Pellowe filed a further affidavit describing the security issues surrounding the Melbourne event that had proceeded on 20 July 2018 with private security and heavy police presence, including riot police, mounted police and a helicopter. The police had quoted a figure slightly under AUD 68,000 for the security services at the event, which Axiomatic refused to pay.

about the event increased the risk of the venue being targeted even in advance of the scheduled date. We think that it was reasonable for RFAL to be influenced by the fact that when Axiomatic made the booking, it did not disclose the controversial nature of the event and the steps taken in Australia to avoid advance publicity. In our view, RFAL was entitled to make its own assessment of the risk and of the practical steps that would be required to manage that risk based on the knowledge and resources then available to it.

Did RFAL fail to follow its health and safety policy?

[94] RFAL had a written Event Health and Safety Policy. It provided for health and safety requirements to be communicated to the client 30 days prior to the event, and for a health and safety plan to be received from the client two weeks prior to the event, with a process for escalation if the information is not provided. The stated purpose of the policy was to set the responsibilities and guiding principles to ensure that events are planned, designed and executed safely and to meet responsibilities under the relevant workplace health and safety legislation. It was intended to cover people working at the venue or in a particular show or patrons attending an event. It was not intended to cover public safety in a broader sense.

[95] It is evident from the timeline described that RFAL did not follow this procedure. Mr Hodder submitted that this failure in itself made the decision unreasonable. He relied on *Chiu v Minister of Immigration* in which this Court observed that in most cases the misinterpretation of voluntarily adopted rules or guidelines will vitiate the decision on the ground that it constitutes an error of law.[69] But the Court also noted that the consequences of misinterpretation depend on context.

[96] We see the circumstances of this case as entirely different to *Chiu*. The policy was not prepared pursuant to any legislative requirement but was intended as guidance in relation to compliance with RFAL's obligations under the Health and Safety in Employment Act 1992.[70] If, on a reasonable assessment, compliance with those obligations required departure from the policy, RFAL was entitled to depart from it.[71]

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69 *Chiu v Minister of Immigration* [1994] 2 NZLR 541 (CA) at 550.

70 Now repealed and replaced by the Health and Safety at Work Act 2015.

71 Graham Taylor *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington,

For the reasons we have already discussed, the circumstances were such as to justify departing from the policy. The booking had been made at quite short notice and, a month from the scheduled date, RFAL discovered that there were aspects about the tour that it had not previously appreciated. The level of risk had escalated significantly over a matter of days. That risk went beyond those directly involved in the venue as workers, performers or patrons but extended to members of the public and protesters. RFAL was entitled to make its own assessment as to what was required in terms of compliance with its obligations under the relevant health and safety legislation.

The "heckler's veto"

[97] The third basis on which the appellants rely as showing that the decision to cancel was unreasonable was that the outcome reflected the so-called "heckler's veto". This phrase describes the situation in which those wishing to exercise their free speech rights are prevented from doing so by actual or threatened protests, particularly threats of violence.[72] Mr Hodder submitted that a decision that resulted in such an outcome would be unreasonable because it would result in a perverse outcome.

[98] The concept of the heckler's veto has a specific associated jurisprudence in the United States in relation to the First Amendment right to freedom of expression. Mr Hodder submitted that the same principles should apply in New Zealand.

[99] In the US the principles developed in response to the heckler's veto reflect the freedom of expression as guaranteed by the First Amendment. Specifically, the wording of the First Amendment precludes any law abridging the freedom of speech, so that any limitations on the First Amendment right must be internal to the provision itself.[73] Self-evidently, this has influenced the basis on which limitations on free speech are permitted. We take as an example the decision in *Bible Believers v Wayne County, Michigan*, which Mr Hodder cited.[74] That case concerned a civil action against the police brought by members of a Christian evangelical group whose efforts to speak during a festival celebrating Arab culture were shut down in the face of

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2018) at [15.74].

72 The phrase is attributed to the American scholar Harry Kalven.

73 This feature is discussed by L'Heureux-Dubé J in *Committee for the Commonwealth of Canada v Canada* (1991) 1 SCR 139 at [82]–[87].

74 *Bible Believers v Wayne County, Michigan* 805 F 3d 228 (6th Cir 2015).

heckling from a group of hostile festival-goers. The United States Court of Appeals (Sixth Circuit) reviewed the cases where the extent to which actions constituting a heckler's veto might justify limiting First Amendment rights had been considered. Noting that it is a "fundamental precept of the First Amendment" that the government cannot favour the right of one private speaker over another, the Court described the heckler's veto as a "type of odious … discrimination" designed to exclude a particular point of view from "the market-place of ideas".[75] In the context of the First Amendment right to freedom of expression, it considered that:[76]

> In a balance between two important interests—free speech on one hand, and the state's power to maintain the peace on the other—the scale is heavily weighted in favour of the First Amendment. … Maintenance of the peace should not be achieved at the expense of the free speech. The freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message. If the mere possibility of violence were allowed to dictate whether our views, when spoken aloud, are safeguarded by the Constitution, surely the myriad views that animate our discourse would be reduced to the "standardization of ideas … by … [the] … dominant political or community groups." … Democracy cannot survive such a deplorable result.
>
> When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behaviour of the rioting individuals.

[100] And as to the practical implications of that principle:[77]

> … before removing the speaker due to safety concerns, and thereby permanently cutting off his speech, the police must first make bona fide efforts to protect the speaker from the crowd's hostility by other, less restrictive means.

[101] The Canadian courts have been cautious in relation to the possible application to Charter freedoms of principles developed in the very different environment of the US. In *Committee for the Commonwealth of Canada v Canada*, the Supreme Court considered whether regulations that would prohibit the handing out of political pamphlets in an airport were a permitted limitation on the Charter right to freedom of

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75 At 247–248.
76 At 252.
77 At 255.

expression. L'Heureux-Dubé J considered the appropriateness of recourse to American jurisprudence in this area:[78]

> The United States Supreme Court has long been grappling with the formulation of an appropriate test, and in the process it has created a whole series of standards that have been applied somewhat unpredictably over the years. We must recognise the differences in approach which result from out distinctive constitutional documents.

[102] The Judge then quoted from the paper "Freedom of Expression: Is It All Just Talk?" by A Wayne MacKay:[79]

> What if anything should Canadian courts do with these various rationales evolved in the United States? As a first preliminary matter, account should be taken of the significant political and social differences between the two countries and how this has been reflected in their historical approaches to freedom of expression and the press. As a second preliminary matter, the linguistic differences between the respective guarantees of freedom of expression should be considered, and in particular the European roots of the Canadian provision—section 2(b) of the Charter.
>
> On a more substantive basis the American rationales should only be used to the extent that they are useful for advancing the purposes and values of the Canadian document.

[103] She concluded:[80]

> Hence we should be particularly vigilant to formulate a "made in Canada" standard, that is sensitive to the legal, sociological, and political characteristics which inspired the *Canadian Charter of Rights and Freedoms* and its subsequent development.

[104] Mr Hodder drew our attention to *UAlberta Pro-Life v Governors of the University of Alberta* as an example of conduct considered in Canada as a heckler's veto scenario.[81] The case concerned the decision of a university to impose conditions (including meeting the cost of security) on a pro-life student group that wished to hold an anti-abortion event on university grounds. A previous similar event attracted substantial counter-protests. The cost of security would have precluded the group from holding the event and it complained that requiring it to meet that cost amounted

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78 *Committee for the Commonwealth of Canada v Canada*, above n 73, at [82].

79 At [86], citing A Wayne MacKay "Freedom of Expression: Is It All Just Talk? (1989) 68 Can Bar Rev 713 at 719.

80 At [87].

81 *UAlberta Pro-Life v Governors of the University of Alberta* 2020 ABCA 1, (2020) 6 WWR 565.

to a denial of their right to freedom of expression. The Court implicitly acknowledged the concept of the heckler's veto:[82]

> Although the University says the concept of the heckler's veto is misplaced here, the position for the University escalated the status of potential objectors to not merely being on par with the expresser, but above the expresser's position.

[105] However, after referring to a number of American cases on this issue, the Court rejected the principles stated as having relevance to the Canadian context:

> [180] All that said, it is not appropriate to immigrate American Constitutional notions into this case. The American case law is interesting, but Canadian law is robust enough to figure things out on its own. …
>
> [181] For example, where a state "action prevents individuals from lawfully expressing themselves because their expression might provoke or enrage others, freedom of expression as guaranteed by s 2(b) is also implicated" … On such occasions the debate moves to s 1 of the *Charter* and whether reasonable limits meeting that provision have been made out.
>
> (Citation omitted.)

[106] We turn to the New Zealand position. Mr Hancock, for the Intervener, argued that the principle as articulated and applied in the US is not easily reconciled with s 5 of BORA, under which the question of limitations on protected freedoms is determined by reference to the statutory test of whether they are reasonable limitations that can be demonstrably justified in a free and democratic society. Mr Hancock submitted that the principle as applied in the US does not reflect the broad range of interests and rights that may be taken into account in deciding whether a limit is demonstrably justified under s 5 and ought not to be regarded as applicable in New Zealand.

[107] The concept of the heckler's veto is one that has general application, including in the New Zealand context. These days, as Mr Hodder commented, it often finds expression in the so-called "cancel culture", where disapproval of a particular view results in the mass withdrawal of support (cancellation) of public figures, particularly online.[83] However, as the Canadian courts have recognised, acknowledging the reality

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82 At [183].

83 Merriam Webster Online Dictionary "Cancel Culture" <www.merriam-webster.com>.

of this phenomenon does not mean that the principles developed in the US can automatically be applied in a different constitutional context.

[108] Again, the US cases reflect the fact that the wording of the First Amendment precludes any limitation on the freedom of expression. The development of jurisprudence around the extent to which limitations may be permitted is therefore quite different from the New Zealand context, where limitations on the same right are expressly contemplated by s 5 of BORA. We discuss this aspect in more detail when we come to consider whether the decision to cancel was a reasonable limitation on the right to freedom of expression. It is sufficient to say at this stage that in New Zealand there is no one approach to the inquiry regarding the reasonableness of a limitation. The proper approach and the range of factors taken into account vary with the nature of the decision and the circumstances in which it is made. The principles articulated in the US context do not fit easily into a s 5 analysis and it is both unnecessary and undesirable to attempt to do so.

[109] Therefore, although the concept of the heckler's veto may be used in New Zealand to describe an outcome where protest or the threat of protest has led to the curtailment of the exercise of the freedom of expression, it would be unprincipled to treat such an outcome as necessarily perverse. That must depend on whether the limitation was reasonable for the purposes of s 5; if so, there could be no basis on which to conclude that the decision was perverse.

Misdirection on the law

[110] The final ground on which the appellants maintain that the decision to cancel was unreasonable was that it was made under a misunderstanding of the appellants' common law rights of free speech and expression (as opposed to the rights affirmed by BORA). This argument rested on the assertion that RFAL decided to cancel the event against a backdrop of unsubstantiated security concerns, thereby acting inconsistently with the event organisers', the speakers' and the appellants' common law rights. However, in oral argument, Mr Hodder confirmed that any substantive differences between the two classes of rights would not have any practical effect in this case. He simply sought to emphasise that free speech and expression issues were

engaged by both BORA and the common law grounds of review. We accept that this is the case but, as we have discussed above, we do not consider that RFAL's security concerns were unsubstantiated. We therefore see no advantage in exploring this aspect of the argument.

Issue 3: was the cancellation an unreasonable limit on the BORA rights engaged?

The BORA rights engaged

[111] We have already concluded that the rights to freedom of expression and peaceful assembly were engaged by the decision to cancel the event. However, we do not accept that the other rights relied on are engaged.

[112] The right to freedom of thought (which includes the right to adopt and hold opinions without interference) has had limited consideration in New Zealand. In *Moonen v Film and Literature Board of Review*, the classification of a book as objectionable was held not to infringe this right.[84] Acknowledging that censorship may deprive some of the opportunity of forming certain thoughts, the Court pointed out that it did not actually censor thoughts. The right therefore was not engaged.[85] Mr Hodder relied on academic criticism of that reasoning, namely that censorship indirectly censored the thoughts that potential readers would have.[86] Even if this criticism were valid, we are satisfied that it is not material in this case. Potential attendees had access to the ideas and views being promoted by the speakers, who both had a substantial internet presence. People were free to form opinions about those ideas. We do not accept that being deprived of the opportunity to hear those ideas discussed in person infringed the right to freedom of thought.

[113] The right to freely associate is, as Ms Joychild QC, for the Intervener, submitted, directed towards the right to form or participate in an organisation, to act collectively, rather than simply to associate as individuals. In *Turners & Growers Ltd v Zespri Group Ltd (No 2)*, White J, considering the meaning of "association" in the BORA context, cited Baroness Hale of Richmond's statement in *R (Countryside*

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84 *Moonen v Film and Literature Board of Review*, above n 58.
85 At [36]–[37].
86 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [14.6.16].

Alliance) v Attorney-General that association in this context "protects the freedom to meet and band together with others in order to share information and ideas and to give voice to them collectively".[87] While the event in this case might have involved the exchange of ideas between individuals, there is no indication of a common associational or organisational aim. The right to freedom of association does not appear, therefore, to be engaged and, in any event, this argument adds nothing to the engaged right of freedom of peaceful assembly.

[114] The last BORA right relied on is the right to freedom from discrimination on the grounds of discrimination specified in the Human Rights Act. One of those grounds on which discrimination is prohibited is political opinion.[88] Discrimination includes indirect discrimination.[89] The appellants say that the decision to cancel indirectly discriminated against them because it put those wishing to attend the event in a less advantageous position that those who would use the venue for some other purpose.

[115] An issue arises over the justiciability of this argument, having regard to this Court's decision in *Winther v Housing New Zealand Corp.*[90] However, the argument advanced by the appellants and the Intervener was not developed and the respondents did not address this issue at all. Given our conclusion that RFAL's decision is reviewable on other grounds it is unnecessary to consider this issue.

Was the decision to cancel a reasonable limitation on the rights of freedom of expression and peaceful assembly?

[116] The BORA rights engaged in this case are not absolute; they may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.[91] In *R v Hansen* the Supreme Court held that where a BORA right is limited by legislation, a proportionality analysis is required to determine whether the limitation is justified under s 5. Under that approach, the limitation must be rationally

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87 *Turners & Growers v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 (HC) at [72], citing *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52, [2008] AC 719 at [118].
88 Human Rights Act 1993, s 21(1)(j).
89 Section 65.
90 *Winther v Housing New Zealand Corporation* [2010] NZCA 601, [2011] 1 NZLR 825.
91 BORA, s 5.

connected to its objective and impair the right or freedom in question as little as possible.[92]

[117] As this Court discussed in *Taylor v Chief Executive of the Department of Corrections*, however, the position is less clear in relation to administrative decisions that infringe a BORA right.[93] *Taylor* concerned the refusal to allow a media interview of a serving prisoner, the decision having been made pursuant to the discretion conferred on the Chief Executive under the Corrections Regulations 2005. The Court considered the views of commentators that the trend in judicial review of administrative decisions that affect BORA-protected rights was towards balancing the right against countervailing considerations rather than a formal proportionality analysis. It held that, in the particular context, the balancing approach was appropriate.[94] But the Court expressly eschewed any determination as to whether review of administrative decision making under the BORA generally requires a form of proportionality analysis of the type adopted in *Hansen*.[95]

[118] The appellants did not contend for a formal proportionality analysis. They submitted only that it was incumbent on RFAL to acknowledge the BORA rights that were engaged and be "alive" to the BORA implications of its decision.[96] Ms Anderson also invited the approach taken in *Taylor* on the basis that the circumstances of this case could not possibly require a more formal approach than that taken in *Taylor*.

[119] Ms Anderson also relied on the decision of the Supreme Court of the United Kingom in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department.*[97] The case concerned the decision to exclude an Iranian dissident from the United Kingdom, with the result that she was unable to accept speaking engagements to address issues of human rights and democracy. On the question of

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92 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64], [120]–[124], [203]–[205] and [272].

93 *Taylor v Chief Executive of the Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648.

94 At [81]–[84], citing *Television New Zealand Ltd v Attorney-General* (2004) 8 HRNZ 45 (CA), which concerned a media request to interview a person detained pursuant to the Immigration Act 1987.

95 At [84].

96 Relying on Taylor, above n 71, and on the High Court decision in *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704 at [74] (that decision having been overturned on other grounds: *Attorne- General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899).

97 *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*, above n 57.

how the courts should respond to complaints about the effect of executive decisions on human rights, Lord Sumption made the following observations about the significance of the decision-maker's role: [98]

> It does not follow from the court's constitutional competence to adjudicate on an alleged infringement of human rights that it must be regarded as factually competent to disagree with the decision-maker in every case or that it should decline to recognise its own institutional limitations. … The executive's assessment of the implications of the facts is not conclusive, but may be entitled to great weight, depending on the nature of the decision and the expertise and sources of information of the decision-maker or those who advise her. Secondly, rationality is a minimum condition of proportionality, but is not the whole test. None the less, there are cases where the rationality of a decision is the only criterion which is capable of judicial assessment. This is particularly likely to be true of predictive and other judgmental assessments, especially those of a political nature. Such cases often involve a judgment or prediction of a kind whose rationality can be assessed but whose correctness cannot in the nature of things be tested empirically. Thirdly, where the justification for a decision depends on a judgment about the future impact of alternative courses of action, there is not necessarily a single "right" answer. There may be a range of judgments which could be made with equal propriety, in which case the law is satisfied if the judgment under review lies within that range.

[120] And Lord Neuberger said:[99]

> … where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision. …
>
> … [W]here, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality.

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98 At [32]

99 At [67]–[68].

[121] Acknowledging the very different context in which *Carlile* was decided, namely that it concerned the decision-making power of the executive in a national security context, Ms Anderson argued that this approach was the appropriate one for the present circumstances and noted that it had been adopted in the more factually similar circumstances of *R (on the application of Ben-Dor) v University of Southampton*, which concerned the decision to refuse permission to hold a conference on university grounds because of security concerns.[100] Mr Hodder did not resist the application of these decisions but submitted that in both cases the decisions were upheld because there had been a thorough process, with all the relevant considerations canvassed and time taken to reflect so that the decision was a careful, rational one. That, he said, was not the case here.

[122] RFAL's decision is distinct because, although RFAL has the broad statutory functions and objectives discussed, the immediate context was the VHA under which Axiomatic had agreed that RFAL would be entitled to cancel on the basis of its own assessment of security issues. Mr Moncrief-Spittle's rights were engaged as a result of his own contract with Ticketmaster. Dr Cumin's interest was neither direct nor personal; he was part of a class of people whose future rights might be affected by RFAL's approach to security issues in the context of controversial events. We have already held that the contractual context does not preclude the decision being judicially reviewed and does not preclude the BORA rights of freedom of expression and peaceful assembly arising. However, we see the countervailing considerations as follows.

[123] First, RFAL's structure means that it necessarily operates on the basis of enforceable contractual arrangements. Weight must be accorded to those arrangements.

[124] Secondly, Axiomatic gave no indication that security was likely to be an issue when it made the booking, yet it is clear from the evidence about the way it had planned the Australian tour that it knew there would be protests. Because Axiomatic had not signalled the likely security issue, no bond was required of it. With less than

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[100] *R (on the application of Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin) at [63].

four weeks before the event Axiomatic still had not provided a health and safety plan. Although not contractually obliged to do so until two weeks beforehand, the significance of that omission can be seen by the fact that in Australia it had begun consulting with the local police two months in advance.

[125] Thirdly, the RFAL personnel involved were experienced in the management of the Bruce Mason Centre and similar venues and had an internal security adviser.

[126] Fourthly, the level of protest escalated significantly during the first week of ticket sales. It was reasonable to expect that this would continue. There was a risk that protesters would purchase tickets so as to gain entry to the venue, which in turn created a risk of action requiring evacuation. The internal security advice from Mr Kidd was that this would create a high security risk for staff, patrons and protesters alike. RFAL knew that the location of the Bruce Mason Centre would make it difficult and expensive to manage protests that might require crowd and traffic control.

[127] It is apparent that most of the problems with this event arose from Axiomatic's decision not to share what it knew about the security risk associated with the event when it made the booking. Had it done so, the suitability of the venue and the real nature of the security risk could have been assessed and managed. The decision to cancel was not inevitable and another decision-maker in like circumstances may have made a different decision. But in the circumstances outlined it cannot be said that the decision was not a rational and reasonable response. We therefore consider that RFAL's decision to cancel the event was a justified limitation on the appellants' BORA-affirmed rights to freedom of expression and freedom of peaceful assembly.

Issue 4: did the appellants have standing to bring the proceedings?

[128] The contemporary approach to the issue of standing is summarised in this Court's decision in *Ye v Minister of Immigration*:[101]

> In New Zealand a generous approach to standing prevails, which is said to be based on the constitutional principle that the courts must ensure that public bodies comply with the law … As a result of this generous approach, the question of standing is combined with the substantive issues as part of the

[101] *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 at [322] (citations omitted).

> judicial review discretion and standing decisions are made on the totality of the facts …

[129] The Judge correctly identified the approach to be taken.[102] He then outlined the nature of the interests relied on by Mr Moncrief-Spittle and Dr Cumin. Specifically, the Judge noted the "paean" to freedom of speech that Mr Moncrief-Spittle included in his affidavit, and his disappointment at the cancellation. He also noted Dr Cumin's status as a resident and ratepayer and as a member of the Jewish community with a particular concern about the risk of exclusion from council assets.[103] However, the Judge concluded that neither had sufficient interest to seek judicial review of RFAL's decision:

> [65] … the subject matter for my review is RFAL's decision to cancel the event. That the applicants wish … to imbue that decision with the values they espouse cannot improve their standing to challenge it.
>
> [66] Mr Moncrief-Spittle's legitimate interest in RFAL's decision is contractual, in relation to any loss and damage he incurred through the cancellation; Dr Cumin's is in desired Council policy-making, which – absent any policy said to be engaged by the decision – may not be justiciable at all, but an issue for participative democracy. Neither has standing to bring this proceeding, but the point is academic given its failure. Standing's materiality is in exercise of discretion to grant relief.
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> (Footnote omitted).

[130] In argument, Ms Anderson conceded that Mr Moncrief-Spittle, as a ticket-holder, did have standing to bring the proceeding. This was a responsible concession. The Judge accepted that, in addition to his own disappointment at missing the performance, Mr Moncrief-Spittle had a genuine concern about the effect of the decision on free speech rights in New Zealand. This is clearly a matter of public interest. A plaintiff who has a bona fide interest in having a matter of public interest considered will have standing unless the claim is frivolous, vexatious or untenable.[104] Clearly, Mr Moncrief-Spittle's position in the proceeding went beyond the mere contractual interest of having purchased a ticket. His standing should have been recognised.

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102 Substantive decision, above n 1, at [62].

103 At [63].

104 *O'Neill v Otago Area Health Board* HC Dunedin CP 50-91, 10 April 1992 at 4; and *Jeffries v Attorney-General* [2010] NZCA 38 at [70].

[131] We also consider that Dr Cumin has standing. The right of a ratepayer to challenge the decision of a local authority has been recognised in numerous cases.[105] For present purposes, however, it is apt to cite from *R v Greater London Council, ex parte Blackburn*, in which a ratepayer was held to have standing to challenge a local authority's decision to issue cinema licences that did not forbid the showing of indecent films. Lord Denning MR said:[106]

> Who then can bring proceedings when a public authority is guilty of a misuse of power? Mr Blackburn is a citizen of London. … His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has.

[132] Dr Cumin is a ratepayer and has, by membership of a particular community, a genuine interest is the way the Council and CCOs manage public assets. He ought to have been recognised as entitled to bring the proceeding.

Issue 5: did the Judge err in making the costs order against the appellants?

[133] Rule 14.7(e) of the High Court Rules 2016 allows the court to refuse to make an order for costs, or to reduce an order for costs that would otherwise be payable, where the proceeding concerned a matter of public interest and the party opposing costs acted reasonably in the conduct of the proceeding. In order to meet the threshold under r 14.7(e) "the proceeding must concern a matter of genuine public interest, have merit and be of general importance beyond the interests of the particular unsuccessful litigant".[107]

[134] The appellants had resisted a costs order on the grounds that the proceeding raised novel and untested questions of public importance relating to fundamental rights and freedoms under BORA and at common law, and important and novel questions relating to the reviewability of local government bodies, particularly CCOs. They maintained that they had acted reasonably.

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105 See, for example, *Walker v Otago Regional Council* HC Dunedin CIV-2009-412-532, 11 June 2009 at [8]–[10]*; Rangitikei District Ratepayers Assoc Inc v Rangitikei District Council* HC Whanganui CP12/00, 28 September 2000 at [3], citing *Ratepayers and Residents Action Assoc Inc v Auckland City Council* [1986] 1 NZLR 746 (CA); and *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460 (HC) at 473.

106 *R v Greater London Council, ex parte Blackburn* [1976] 1 WLR 550 (CA) at 558–559.

107 *Taylor v District Court at North Shore (No 2)* HC Auckland CIV 2009-404-2350, 13 October 2010 at [9].

[135] The Judge rejected these submissions and made a costs order of $46,532 plus disbursements of $940.[108] Reiterating what he had said in his substantive judgment, the Judge considered, first, that the appellants had only raised questions about fundamental rights and freedoms "to imbue [RFAL's] decision with the values [the applicants] espouse".[109] Secondly, the Judge considered that there was nothing about CCOs that required anything other than an orthodox application of well understood judicial review principles.[110] He concluded that:

> [5] Consistently with my conclusions RFAL exercised no public power in deciding to cancel the event – or public function, power or duty in cancelling the event – the proceeding did not concern any matter of public interest. The applicants' self interest, although not disqualifying in itself, here lacked the 'watchdog' quality informing public interest considerations on costs and constituted "something of a crusade" to inject the subject matter of that self-interest into RFAL's decision making.
>
> (Footnotes omitted).

[136] The Judge relied for these conclusions on this Court's decision in *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*.[111]

[137] The "watchdog principle" to which the Judge referred was first articulated in *Ratepayers and Residents Action Association Inc v Auckland City Council*.[112] An incorporated society, whose objects were to promote, protect and advance the interests of the residents and ratepayers of Auckland, sought judicial review of the Auckland Council's decision to enter into a contract for the construction of the Aotea Centre. On the question whether the society should pay security for costs, this Court upheld the High Court's decision to award security but reduced the amount on the grounds that the Judge had failed to weigh the public interest as a factor in the exercise of his discretion. Richardson J said:[113]

> … compliance with the law by those acting under statutory powers is itself a matter of public interest and the availability of judicial review … is a …

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108 Costs decision, above n 2.
109 At [4(a)].
110 At [4(b)].
111 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2013] NZCA 555 at [13].
112 *Ratepayers and Residents Action Assoc Inc v Auckland City Council*, above n 105.
113 At 750.

> recognition of the need to provide adequate procedures for testing the purported exercise of statutory powers … the law must somehow find a place for the disinterested citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge.
>
> In acting in a responsible way as watchdogs of the public interest community organisations perform a valuable public service. …

[138] This principle was endorsed in the context of r 17.7(e) in *New Zealand Climate Science Education Trust*.[114] We infer that the Judge's "something of a crusade" comment is drawn from the *New Zealand Climate Science Education Trust* case in which the first instance Judge (upheld on appeal) declined to discount the costs awarded against the applicant on the basis that the Trust, having mounted "something of a crusade", could not be said to have been acting reasonably.[115]

[139] The respondents maintain that the proceeding lacked merit and did not involve any matter of genuine public interest beyond the interests of the appellants themselves sufficient to engage r 14.7(e). It will be apparent from our discussion above that we consider that some of the issues raised in this case were novel and important, particularly the availability of judicial review in respect of contractual decisions by CCOS. Given the extensive reach of such organisations in local government, this was an issue that warranted careful consideration. The case bears no real resemblance to the *New Zealand Climate Science Education Trust* case in which repeated attempts to challenge NIWA records (which were always doomed to fail because they were not matters that could be determined by a court) were ultimately abandoned.

[140] As to the appellants' conduct, we accept that the cause of action against Mr Goff could have been abandoned earlier. Apart from that aspect, however, there is no basis for criticism.

[141] We consider that the Judge erred in refusing to reduce the costs that would otherwise have been payable. Given the importance of the issues raised we consider that costs and disbursements payable by the appellants should have been reduced by 70 per cent.

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114 *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd*, above n 111, at [13].

115 At [14], citing *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297, [2013] 1 NZLR 75 at [47].

Result

[142] The appeal against the High Court's substantive decision is dismissed.

[143] The appeal against the High Court's costs decision is allowed. Costs and disbursements payable in the High Court are reduced by 70 per cent.

[144] Counsel may file memoranda as to costs on the appeal within 10 working days from the date of this decision.

Solicitors:
Franks Ogilvie, Wellington for Appellants
Anthony Harper, Auckland for Respondents
Human Rights Commission, Auckland as Intervener